SUPREME COURT, U. S.

FILED

OCT 8 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-395

JOHN W. NORMAN, *et al.*,

Petitioners,

v.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NATHANIEL R. JONES
WILLIAM D. WELLS
BARBARA A. MORRIS
1790 Broadway—10th Floor
New York, New York 10019

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

Attorneys for Petitioners

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Statutory Provisions Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 11

Appendix—

District Court Order of December 19, 1973 Denying Relief 1a

Opinion of the United States Court of Appeals of June 4, 1974 ..... 5a

Table of Authorities

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) 5

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) 9

Arkansas Education Association v. Board of Education, 446 F.2d 763 (8th Cir. 1971) 9

Baxter v. Savannah Sugar Refining Co., 495 F.2d 437 (5th Cir. 1974), Petition for Certiorari filed September 27, 1974, No. 74- 7

PAGE

Bowe v. Colgate-Palmolive Co., 6 EPD ¶8973 (7th Cir. 1973) 8

Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972) 8

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 9

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) 8

Hodgson v. Ricky Fashions, Inc., 434 F.2d 1261 (5th Cir. 1970) 9

Jackson v. Wheatley School District, 464 F.2d 411 (8th Cir. 1972) 9

Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969) 7

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 5, 7

Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973), Cert. granted, June 3, 1974 5

Love v. Pullman Co., 404 U.S. 522 (1972) 5

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5

Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721 (5th Cir. 1961) 9

Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973) 8

Norman v. Missouri Pacific R.R., 414 F.2d 73 (8th Cir. 1969) 3

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 6, 7, 8

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 5

PAGE

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) 8
Rogers v. International Paper Co., No. PB 71-C-47 (E.D. Ark. December 11, 1973), pending appeal as Nos. 74-1086, 74-1087, 74-1101, and 74-1115 ..... 6, 10
Rosen v. Public Service Electric & Gas Co., 477 F.2d 90 (3rd Cir. 1973) 7

Schaeffer v. San Diego Yellow Cab, Inc., 462 F.2d 1002 (9th Cir. 1972) 8
Smith v. Board of Education, 365 F.2d 770 (8th Cir. 1966) 8, 9
Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) 8

U.S. v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), decision on remand, —— F.Supp. ——, 7 EPD ¶9167 (N.D.Ga. 1974) 7
U.S. v. N.L. Industries, 479 F.2d 354 (8th Cir. 1973) 6
United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973) 4, 5, 6

Other Authorities:

29 U.S.C. §3201 et seq. 9

42 U.S.C. §2000e et seq. 2, 3, 6, 9, 10

42 U.S.C. §2000e-5(g) 2

IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. .....

JOHN W. NORMAN, *et al.*,

Petitioners,

v.

MISSOURI PACIFIC RAILROAD, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eight Circuit entered in this proceeding on June 4, 1974, rehearing and rehearing *en banc* denied on July 10, 1974.

Opinions Below

The opinion of the Court of Appeals is reported at 497 F.2d 594. The opinion of the District Court for the Eastern District of Arkansas is unreported. All opinions are reprinted in the Appendix hereto.

Jurisdiction

The judgment of the Court of Appeals for the Eighth Circuit denying rehearing and rehearing *en banc* was

entered on July 10, 1974 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Whether monetary restitution to black employees who have been discriminated against in employment on account of their race in violation of Title VII, Civil Rights Act of 1964, must be conditioned upon:

(1). proof that the policies and practices of the defendant employer which violated Title VII were maintained in bad faith, and

(2). each black employee's ability to prove the exact amount of his economic harm.

Statutory Provisions Involved

United States Code, Title 42:[1]

> § 2000e-5(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts

[1] This section was changed by the 1972 Amendments to Title VII, P.L. 92-261, March 24, 1972, Sec. 4, to limit back pay liability to a period of two years prior to filing a charge with the Equal Employment Opportunity Commission.

earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

Statement of the Case

This action was filed in 1966 by ten black employees of the Missouri Pacific Railroad alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.[2] The plaintiffs alleged that the maintenance of an all-black job classification of "train porter" and a more remunerative all-white job classification of "brakeman" performing substantially the same tasks was in violation of Title VII. The Amended Complaint requested *inter alia* a merger of the classifications and back pay for the black porters. The case was initially dismissed by the District Court on jurisdictional grounds and reversed and remanded for trial by the Court of Appeals. *Norman* v. *Missouri Pacific R.R.*, 414 F.2d 73 (8th Cir. 1969).

Pending trial in the instant case, the Court of Appeals had occasion to review another Title VII railway case involving similar facts and issues concerning appropriate

[2] While originally filed as a class action, the Amended Complaint omitted the class action and Sections 1981 and 1983 allegations.

relief. *United States* v. *St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973), hereafter referred to as *Frisco*. In *Frisco*, the Court of Appeals sitting *en banc* denied back pay to black porters whom it had determined were victims of the railway's discriminatory practices on the grounds that there was no showing of bad faith in maintaining the illegal practices and that the dates upon which black porters would have become physically unqualified to perform the duties of brakemen were incapable of determination. 464 F.2d at 311.

In view of the factual similarities between *Frisco* and the instant case and further in view of the uniform position of the Circuit on the question of back pay prerequisites, the parties in this case entered into a partial settlement.[3] Reserved for determination by the Court, however, was the question of whether the seven plaintiffs who had retired as porters while the litigation was pending were entitled to seek an upward increase in their retirement pay comparable to what they would be receiving had they retired as brakemen.

Without hearing any factual submission on the issues of disparate retirement income or prior qualifications and abilities, the District Court ruled as a matter of law that the retired plaintiffs were not entitled to the relief sought. Pp. 1a-4a. The Court stated that the claim for increased retirement benefits was indistinguishable from a claim for back pay and that therefore the rationale of the *Frisco* decision precluded such relief.

---

[3] The partial settlement, patterned after the *Frisco* relief, provided that porters who were able to perform brakemen duties would be allowed to transfer to that position, carrying one-half of their porter seniority with them. The porters who had not retired by the time of the settlement did so transfer, and of course will retire as brakemen with retirement incomes greater than that of their presently retired co-plaintiffs.

The Court of Appeals affirmed the District Court's decision, reiterating the *Frisco* requirements of bad faith and lack of speculation in calculation. Pp. 5a-11a. In the absence of any factual foundation, the Court stated that it would be impossible for any presently retired train porter to show that he was, at some point prior to his retirement, physically able and otherwise qualified to perform the duties of brakemen. While placing the burden upon the plaintiffs of proving with precision the existence of prior qualifications, the Court concurrently foreclosed them from making such a showing.

Reasons for Granting the Writ

The Fifth Circuit has recently noted that "Title VII litigation is now entering what may properly be termed the 'recovery stage' ". *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1380 (5th Cir. 1974). Prior decisions of this Court interpreting Title VII have included matters of procedure and substance,[4] but the conflict between the decision below and those of other Circuits now requires consideration by this Court of the question of appropriate standards for relief.

The decision below reaffirms the Eighth Circuit's dichotomy established between liability and entitlement to relief under Title VII, requiring bad faith on the part of the discriminator for the latter but not for the former. The Court has also established a standard of placing the burden of speculation as to past entitlements upon the

[4] See, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Love* v. *Pullman Co.*, 404 U.S. 522 (1972); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); and *Alexander* v. *Gardner-Denver Co.*, 94 S.Ct. 1011 (1974). See also, *Johnson* v. *Railway Express Agency, Inc.*, No. 73-1543, *cert. granted*, June 3, 1974.

victims of discrimination, effectively frustrating the remedial purpose of Title VII to restore victims of discrimination to their rightful place to the degree possible. These standards for awarding financial restitution to victims of discrimination are squarely at variance with, and have been specifically rejected by, decisions of every other Circuit which has addressed the issue. The decision below is in direct conflict with the uniform interpretation of Title VII adopted by other Circuits, and in conflict with prior decisions of the Eighth Circuit and of this Court on analogous questions.

In two prior decisions interpreting Title VII, the Eighth Circuit has found violations of the Act coupled with financial harm resulting from the discrimination, yet the Court has insulated the discriminators from monetary liability based upon the notion that the defendants had not acted in bad faith in refusing to voluntarily change their illegal practices. *U.S.* v. *St. Louis-San Francisco Ry., supra; U.S.* v. *N.L. Industries,* 479 F.2d 354, 380 (8th Cir. 1973).[5] The decision below also reaffirms the Court's *en banc* decision in *Frisco* holding that equitable relief in the form of back pay must be denied where the formulation of such relief would call for some speculation.

In a series of cases culminating with the recently decided *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211 251-63, (5th Cir. 1974), the Fifth Circuit has held that good faith compliance by the defendant with Title VII is an improper basis for denying financial restitution, 494 F.2d

[5] At least one District Court within the Eighth Circuit has applied the rule in *N.L. Industries* to deny back pay because of unfairness to the discriminator since it was not on notice that its practices were illegal prior to the commencement of the lawsuit. See, *Rogers* v. *International Paper Co.,* No. PB 71-C-47 (E.D. Ark. December 11, 1973), Slip Opinion, pp. 36-37, pending appeal as Nos. 74-1086, 74-1087, 74-1101, 74-1115.

at 251. See, *Johnson* v. *Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969); *U.S.* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973); and *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). See also, *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 442-3 (5th Cir. 1974). ("It is now settled law in our circuit that good faith is not a defense to an action for class-wide back pay.")[6]

The Fifth Circuit has also adopted a position contrary to the Eighth Circuit's on the issue of the burden placed upon the plaintiff seeking equitable, financial restitution. Recognizing that a reconstruction of past circumstances is "impossible," "pure conjecture," and based upon "probabilities," *Johnson* v. *Goodyear Tire & Rubber Co., supra* at 491 F.2d 1379-80, the Court has determined that the burden initially placed upon the discriminatees is only to show that they have been hired into a particular position because of their race and frozen there because of the operation of a neutral employment practice having a discriminatory impact. Once they have shown that, they are presumptively entitled to financial restitution such as back pay.[7] The burden of proof then shifts to the discriminator to show other facts or circumstances (i.e., physical disqualification) justifying a denial of relief. *Id.* at 1379-80. Accord, *Pettway* v. *American Cast Iron Pipe*

---

[6] On September 27, 1974, a Petition for Certiorari was filed raising, *inter alia*, the question of what impact a finding of good faith conduct has upon back pay awards.

[7] The obligation to make financial restitution for Title VII violations has not been limited to back pay, but has been held to embrace prospective retirement income adjustments where the amount of the retirement income has been connected to the illegal employment practice. See, *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 95-96 (3rd Cir. 1973); *U.S.* v. *Georgia Power Co.*, —— F.Supp. ——, 7 EPD ¶ 9167 (N. D. Ga. 1974); *Pettway, supra* at 494 F.2d 263.

Co., supra at 259-60; *Cooper* v. *Allen*, 467 F.2d 836, 840 (5th Cir. 1972).

In addition to the Fifth Circuit, which has dealt with the issue of back pay entitlement more often than any other court, four other Circuits have taken a position contrary to the Eighth Circuit on the question of good faith and speculation. See, *Bowe* v. *Colgate-Palmolive Co.*, not reported in Federal reporter, 6 EPD ¶ 8973 (7th Cir. 1973). ("[E]xact reconstruction of the work history of each employee had the system contained no discriminatory element is impossible. . . . Where resort to presumption is deemed necessary, the presumption should be in favor of the member of the class."); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971) ("intentionally" in Section 706(g) means deliberate rather than accidental); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 804 (4th Cir. 1971) (defendant's motive and speculative character of award are not defenses to back pay liability); *Moody* v. *Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973) (good faith not a defense to back pay); *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 877 (6th Cir. 1973) ("Good faith by Timken either during the 1965-68 period or thereafter is not a valid defense to a claim for back pay."); and *Schaeffer* v. *San Diego Yellow Cab, Inc.*, 462 F.2d 1002, 1006-7 (9th Cir. 1972) ("It is unfair to force an innocent employee to forego his rights under law while litigation drags through the courts. . .").

The decision below is in conflict with other decisions of the Eighth Circuit on analogous questions. In *Smith* v. *Board of Education*, 365 F.2d 770 (8th Cir. 1966), a case involving teacher dismissals arising under 42 U.S.C. § 1983, the Court stated:

> "Each of the former Sullivan teachers . . . shall be entitled and shall be afforded the opportunity to

establish, if he can, that he was damaged by his dismissal and the amount of such damage." *Id.* at 784.

See also, *Arkansas Education Association* v. *Board of Education,* 446 F.2d 763, 770 (8th Cir. 1971); and *Jackson* v. *Wheatley School District,* 464 F.2d 411, 413, n. 1 (8th Cir. 1972), holding that back pay for discriminatorily discharged teachers is a necessary and integral form of equitable relief.

Conditioning awards of monetary relief upon the bad faith of the discriminator is contrary to this Court's decision in *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971). In *Griggs,* this Court stated that intent of the discriminator was irrelevant to determining liability under Title VII, noting that the Act was directed to the consequences of the employment practice, not to the motivation. One of the consequences of the employment practices found to violate Title VII in this case is that the retired black porters are receiving a lesser retirement income than they would be receiving had they been white while actively employed. Allowing notions of good or bad faith to control relief for the consequences of discrimination is manifestly at variance with the remedial purposes of Title VII.

In cases arising under the Fair Labor Standards Act, 29 U.S.C. 3201 et seq., this Court has repeatedly held that uncertainty and lack of precision in measuring damages resulting from violations of the Act does not preclude an award. See, *Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 688 (1946). See also, *Mitchell* v. *Mitchell Truck Line, Inc.,* 286 F.2d 721, 725-726 (5th Cir. 1961) and *Hodgson* v. *Ricky Fashions, Inc.,* 434 F.2d 1261, 1262-1263 (5th Cir. 1970). The Court's decision in *Anderson, supra* at U.S. 687-688, also states that the burden is upon the employee to show that he was in fact a victim of the illegal

practice, shifting the burden to the employer to show with specific proof that the employee is not entitled to the compensation claimed.

The substantiality of the questions presented by this Petition is demonstrated by the position taken by the United States in an *amicus curiae* brief in *Rogers* v. *International Paper Company,* (8th Cir. Nos. 74-1086, 74-1101, 74-1115). Arguing that defenses based upon good faith, speculativeness of damages, and lack of notice should not preclude back pay awards, the Government stated:

> "Every other court of appeals has recognized that back pay is equally important to redress employment discrimination under Title VII. Thus the established law is that back pay is required to make whole the victims of such discrimination unless extraordinary circumstances are present which would render such an award unjust." Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae, p. 45.

The Equal Employment Opportunity Commission pointed out that allowing such defenses to prevail over the economic harm done to the victims of discrimination "creates an unnecessary amount of conflict with established law in this and other circuits." *Id.* at p. 48.

In formulating the appropriate relief for cases involving discrimination in employment, monetary relief should be a central concern of the courts. To emasculate the back pay provisions of Title VII as the Court has done in the decision below will have the effect of freezing an entire generation of victims of discrimination into an economic pattern which existed prior to the Act.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit.

NATHANIEL R. JONES
WILLIAM D. WELLS
BARBARA A. MORRIS
1790 Broadway—10th Floor
New York, New York 10019

GEORGE HOWARD, JR.
329½ Main Street
Pine Bluff, Arkansas

Attorneys for Petitioners

District Court Order of December 19, 1973 Denying Relief

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR 66-C-258

JOHN NORMAN, *et al.*,

Plaintiffs,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,

Defendant,

vs.

BROTHERHOOD OF SLEEPING CAR PORTERS, ETC., AND UNITED TRANSPORTATION UNION, ETC.,

Third Party Defendants.

ORDER

(Filed in U. S. District Court on December 19, 1973)

The Complaint in this case was filed December 30, 1966 pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and involves employment discrimination claims by ten black individuals formerly employed as train porters with Defendant Missouri Pacific Railroad Company. The plaintiffs contend that they were discriminated against because of their Negro race in initial assignment to the craft of train porter and in the continued

failure of the Railroad to afford train porters all of the rights and privileges afforded to members of the craft of brakemen whose job duties and responsibilities plaintiffs contend were identical to those of train porters. The Complaint was initially dismissed on jurisdictional grounds but that judgment was vacated by the Court of Appeals. *Norman* v. *Missouri Pacific Railroad Company*, 414 F.2d 73 (8th Cir. 1969).

Since the opinion of the Court of Appeals in this case, a virtually identical case has been litigated to a conclusion on the merits. *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301 (8th Cir. 1972) cert. denied, 409 U.S. 1107 (1973). The opinion of the Court of Appeals *en banc* in that case held that racial discrimination had been practiced against train porters and that injunctive and declaratory relief was warranted. The Court directed that train porters be offered the opportunity to transfer to the craft of brakemen provided they could pass appropriate physical examinations and training programs and that transferring train porters be permitted to carryover one-half of all seniority previously acquired by them during their employment as members of the craft of train porters. The Court denied the train porters' claim for an award of back pay. A detailed statement of the relief to be afforded is set forth in the *en banc Frisco* opinion of the Court of Appeals and in a subsequently entered Interim Decree of the United States District Court, Eastern District of Missouri, Eastern Division.

The parties to this litigation have agreed that resolution of the merits of this case is governed by the principles enunciated in the *Frisco* litigation. Thus, eligible train porters are to be afforded the opportunity to transfer crafts

and to take with them carry-over seniority. Some of the ten named plaintiffs herein have already transferred to the craft of brakemen and they will be entitled to have added to their brakeman seniority one-half of the seniority previously acquired while serving as train porters. The parties have also agreed that *Frisco* precludes an award herein of back pay.

The parties were however unable to agree on two ancillary issues involved in this litigation. The first such issue involves a claim by train porters who have now retired as such that, had they been earlier permitted to transfer to the craft of brakemen, their retirement benefits would have been enhanced. They therefore ask this Court to award them some such relief. The Court finds however that the claim for increased retirement benefits is indistinguishable from a claim for back pay and that therefore the rationale of *Frisco* precludes such relief. It will be denied.

Finally, the parties have been unable to agree on the claim of counsel for the plaintiffs for an attorney's fee award to be paid by the defendants. The Court will award an attorney's fee. On the basis of the record and plaintiffs' submissions, the Court finds a reasonable fee under the facts and circumstances to be $7,000.00, that being a single, overall fee to be divided among the attorneys participating on behalf of the plaintiffs, as they deem fit.

It Is Therefore Ordered and Adjudged that defendants establish and implement procedures designed to afford to the plaintiffs herein the relief to which they are entitled in the form of an opportunity for job transfer and carry-over seniority equivalent to one-half of their train porter seniority; that the plaintiffs' claims for increased retire-

ment benefits and back pay be and they are hereby denied; that an attorney's fee in the amount of $7,000.00 be and it is hereby awarded to counsel for the plaintiffs; and that this case, in accordance with the provisions hereof, be and it is hereby dismissed.

/s/ GARNETT THOMAS EISELE
United States District Judge

Dated: December 19, 1973.

Opinion of the United States Court of Appeals of June 4, 1974

Before:

BRIGHT and ROSS, *Circuit Judges,*
and TALBOT SMITH, *Senior District Judge.**

ROSS, *Circuit Judge.*

This action, alleging deprivation of rights guaranteed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and by 42 U.S.C. §§ 1981 and 1983, was instituted in 1966 by ten black persons individually and as representatives of the class of train porters employed by the Missouri Pacific Railroad. An amended complaint deleted the class action counts and the jurisdictional claims under §§ 1981 and 1983. At issue was the charge that Missouri Pacific Railroad had racially discriminated in the initial assignment of the ten plaintiffs to the craft of train porter and that it continued to so discriminate by failing to afford train porters all the rights and privileges afforded members of the craft of brakemen. That action was dismissed in the lower court on jurisdictional grounds. On appeal to this Court, we vacated the judgment and remanded the matter to the district court. Norman v. Missouri Pacific R. R., 414 F.2d 73, 85 (8th Cir. 1969).

After remand, the case remained on the docket of the district court with the consent of the parties pending final resolution of United States v. St. Louis-San Francisco Ry., 464 F.2d 30 (8th Cir. 1972), cert. denied, 409 U.S. 1107, 93 S. Ct. 900, 34 L.Ed.2d 687 (1973) [Frisco], a factually similar case raising many of the same legal issues as the

* TALBOT SMITH, Senior District Judge, Eastern District of Michigan, sitting by designation.

Norman complaint. Ultimate resolution of most of the issues in the instant case was accomplished through a stipulation of the parties which essentially followed the remedy imposed in *Frisco*:

> [E]ligible train porters are to be afforded the opportunity to transfer crafts and to take with them carryover seniority. Some of the ten named plaintiffs herein have already transferred to the craft of brakemen and they will be entitled to have added to their brakeman seniority one-half of the seniority previously acquired while serving as train porters. The parties have also agreed that *Frisco* precludes an award herein of back pay.

However, the parties failed to agree on the resolution of the issue of retirement benefits of some of the plaintiffs and the question of attorneys fees. Those issues were submitted to the district court for its determination. Attorneys fees were awarded to the plaintiffs by the court and that determination has not been appealed to this Court. The claim by train porters who have now retired but who, had they been earlier permitted to transfer to the craft of brakemen, would allegedly have been the recipients of enhanced retirement benefits, was determined adversely to the plaintiffs. The district court found that the claim for increased retirement benefits was indistinguishable from a claim for back pay and that, accordingly, the rationale of *Frisco* foreclosed such relief. For the reasons hereinafter expressed, we affirm.

Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) provides in part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.
>
> . . . . . .

Other circuits have found back pay awards to be appropriate remedies for redress of violations of Title VII. *See, e. g.,* Head v. Timken Roller Bearing, 486 F.2d 870, 878 (6th Cir. 1973); Moody v. Albemarle Paper Co., 474 F.2d 134, 142 (4th Cir. 1973); United States v. Hayes International Corp., 456 F.2d 112, 121 (5th Cir. 1972); Robinson v. Lorillard, 444 F.2d 791, 802 (4th Cir.), cert. denied, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir 1969). The requested relief here is technically not a request for back pay. However, our position enunciated in *Frisco* on the propriety of back pay awards under similar facts controls the result here.

In *Frisco,* this Court found that race had been a factor in the Railroad's hiring practices and that it had accounted for the effective segregation of whites as brakemen and blacks as porters. Since the two crafts were not functional equivalents, merger was held to be an inappropriate remedy. Instead, we determined that if the former train

porters could pass the physical examination then given to brakemen of similar age and were determined to be qualified for brakemen positions after completion of the mandated free training course, the Railroad had an obligation to hire such employees as brakemen. One-half seniority was ordered credited to all reemployed former train porters. Back pay, however, was denied. Two grounds were advanced for the back pay conclusion: the employer had not acted in bad faith in refusing to implement the government's proposed remedy and "it would be impossible to determine on what date those train porters who are now physically unqualified to become brakemen, became physically unable to perform." United States v. St. Louis-San Francisco Ry., *supra*, 464 F.2d at 311.

Reliance upon an employer's good or bad faith in considering the propriety of back pay awards under Title VII has been seriously questioned by other courts. Some circuits have held that good faith conduct by an employer does not insulate him from awards for back pay. Rather, they have concluded, the requirement of 42 U.S.C. § 2000e-5(g), *supra*, for "intentional" conduct simply imports that the defendant meant to do what he did, that is, that his employment practice was not accidental. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002, 1006 (9th Cir. 1972); Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1201 (7th Cir. 1969), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237 (1971); Local 189 United Papermakers & Paperworkers v. United States, 412 F.2d 980, 996 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100 (1970). *See also*

Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). In United States v. N. L. Industries, Inc., 479 F.2d 354, 380 (8th Cir. 1973), this Court refused a back pay award noting as follows:

> In this Circuit the law in regard to backpay has not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses due to continuation of past or present discriminatory policies. However, where an employer and union have had ample opportunity to remedy an unlawful employment practice, they should be put on notice that they will be held responsible for the economic losses accruing to the parties injured by such unlawful employment practices.

This indication of a possible change in our policy as to cases originating subsequent to United States v. N. L. Industries, Inc., *supra,* does not mandate an award in this case which originated prior thereto. However, even a contrary position regarding the relevance of bad faith would not repudiate our determination in *Frisco* nor affect *Frisco's* applicability to this case, for an adequate and independent ground sustains the result reached therein.

The second basis for the denial of back pay in *Frisco* was founded on the nonidentity of the two crafts and attendant problems thereby created. Additional qualifications were essential to the remedial right to membership in the class of brakemen. In order to demonstrate entitlement to relief, each plaintiff was required to establish that he possessed the qualifications for a brakeman. Absent the possession of those qualifications, a plaintiff had not been the subject

of the alleged racial discrimination. Back pay was refused because there was no ascertainable standard for judging whether present unqualified train porters would otherwise have been qualified during the course of their employment to be brakemen but for racial discrimination. No standard could determine the right to back pay itself nor the date from which to compute any right to back pay. Courts that have found back pay awards to be appropriate remedies in Title VII actions have generally recognized that such awards should be limited to actual damages, Head v. Timken Roller Bearing, *supra,* 486 F.2d at 878; Bowe v. Colgate-Palmolive Co., *supra,* 416 F.2d at 721; may be avoided by business necessity or other special circumstances, Head v. Timken Roller Bearing, *supra,* 486 F.2d at 877; Moody v. Albemarle Paper Co., *supra,* 474 F.2d at 142; Schaeffer v. San Diego Yellow Cabs, Inc., *supra,* 462 F.2d at 1006; and are especially appropriate where they are based on a fixed wage rate and ascertainable periods of work, Robinson v. Lorillard, *supra,* 444 F.2d at 804. The keystone to the *Frisco* result, then, was the impropriety of remedies based on retrospective and indefinite standards.

The same problems underly the question before us. The parties here have likewise recognized the functional non-equivalence of the two crafts. *Eligible* train porters were permitted a right to transfer crafts. However, some train porters who are now retired might never have been qualified to be brakemen even without any racial discrimination. They are not thus subjects of past discrimination and are not entitled to relief in the form of enhanced retirement benefits. Other train porters now retired who are unqualified to be brakemen, cannot establish the restrospective date of the onset of their nonqualification with sufficient

certainty to permit the imposition of additional retirement benefits. Because retrospective qualification for the brakemen craft is impossible to measure in the present, no ascertainable standard exists to govern the past right to have been a brakeman nor to establish a date from which any possible retirement benefits could have been computed.

We are bound by the determination of this Court sitting *en banc*. This panel does not have the authority to overrule the Circuits position expressed in *Frisco*. Because the *Frisco* plaintiff's request for back pay is logically indistinguishable from the instant plaintiffs' request for enhanced retirement benefits, *Frisco* controls the result reached here. Enhanced retirement benefits are therefore an inappropriate remedy for these retired train porters.

Plaintiffs also contend that the summary disposition of the claim for enhanced retirement benefits denied them the opportunity to offer factual evidence and deprived them of due process. The tendered evidence purportedly related to the fact of racially disproportionate retirement benefits of the two crafts. However, as discussed above, the remedy affords entry into a craft requiring different qualifications: entitlement to the relief rests upon each plaintiff's ability to demonstrate possession of those qualifications; and it is impossible to prove the fact or date of restrospective qualification by those no longer qualified or retired. Those facts and the *Frisco* rationale disapproving speculative remedies, render the right to enhanced retirement benefits an inappropriate remedy for these retired porters. Evidence relating to any factual disparities in retirement benefits of the two crafts would therefore be irrelevant.

The decision of the district court is affirmed.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-395

JOHN W. NORMAN, et al.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT
Missouri Pacific Railroad Company in Opposition

HERSCHEL H. FRIDAY
G. ROSS SMITH
1100 Boyle Building
Little Rock, Arkansas 72201
Attorneys for Respondent, Missouri Pacific Railroad Company

St. Louis Law Printing Co., Inc., 415 Olive Street 63102 314-621-4697

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutory Provision Involved	2
Statement of the Case	3
Argument	7
Conclusion	12

Table of Cases

Baxter v. Savannah Sugar Refining Company, 495 F.2d 437 (5th Cir. 1974), cert. denied 43 L.W. 3306 (1974) 10

Jinks v. Mays, 464 F.2d 1223, 1226 (5th Cir. 1972) 8, 10

Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969) 8

Norman v. Missouri Pacific Railroad Company, 414 F.2d 73 (8th Cir. 1969) 3, 7

Norman v. Missouri Pacific Railroad Co., 497 F.2d 594 (8th Cir. 1974) 6, 9

Parham v. Southwestern Bell Telephone Company, 433 F. 2d 421 (8th Cir. 1970) 8

Pettway v. American Cast Iron Pipe Company, 494 F.2d 211 (5th Cir. 1974) 8, 10

United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973) 8, 10

United States v. Ironworkers Local 86, 443 F.2d 544 (9th Cir. 1971), cert. denied 404 U.S. 984 (1971) 7

United States v. N. L. Industries, 479 F.2d 354 (8th Cir. 1973) 8

United States v. St. Louis-San Francisco Ry., 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973) .. 4, 5, 11

Other Authorities

45 U.S.C.A. § 228 6

45 U.S.C. § 152, Ninth 3

42 U.S.C. § 2000e-3(a) 3

42 U.S.C. § 2000e-5(g) 2, 3, 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-395

JOHN W. NORMAN, et al.,
Petitioners,

v.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Missouri Pacific Railroad Company in Opposition

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas, Western Division, is unreported. The opinion of the Court of Appeals is reported at 497 F.2d 594. Both opinions are set forth in the Appendix to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the denial of a monetary award to black employees who, because of their retirement, cannot establish that they were members of a class of employees discriminated against, or that they have suffered financial loss as a result of a discriminatory employment practice, constitutes an abuse of discretion under Title VII of the Civil Rights Act of 1964.

STATUTORY PROVISION INVOLVED

United States Code, Title 42:

§2000e-5(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and orders such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was

suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

The Complaint in this case was filed December 30, 1966, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* by ten black individuals who alleged that Defendant Missouri Pacific Railroad Company had discriminated against plaintiffs, because of their race, in initially assigning them to the craft of train porter and in thereafter failing to afford train porters all of the rights and privileges afforded to members of the separate and distinct craft of brakemen.[1] Missouri Pacific denied that it had practiced racial discrimination in employment matters, denied that the job duties and responsibilities of train porters were functionally identical to those of brakemen and asserted that since the plaintiffs in effect demanded a merger of the crafts of train porter and brakeman with which the Railroad was obliged to treat separately,[2] only the National Mediation Board under the Railway Labor Act had jurisdiction over the matters asserted. In an unreported decision of the District Court, the Complaint was dismissed on jurisdictional grounds but that judgment was vacated by the Court of Appeals which held that plaintiffs had stated a cause of action under Title VII. *Norman v. Missouri Pacific Railroad Company*, 414 F.2d 73 (8th Cir. 1969).

---

[1] Historically, train porters were treated as a separate craft classification, were represented by their own certified collective bargaining representative (The Brotherhood of Sleeping Car Porters), and were protected by a contract separate and distinct from that governing the rights and obligations of brakemen. Brakemen were traditionally represented by the Brotherhood of Railway Trainmen, predecessor of the United Transportation Union which now represents brakemen and which has been made a party to this case. See generally *Norman v. Missouri Pacific Railroad Company*, 414 F.2d 73 (8th Cir. 1969).

[2] 45 U.S.C. § 152, Ninth.

After the remand of this case, it remained on the docket of the District Court with the consent of the parties pending final resolution of a virtually identical case against the "Frisco" Railroad, styled *United States v. St. Louis-San Francisco Ry.*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U.S. 1107 (1973) (hereinafter *"Frisco"*).

In *Frisco*, the United States Court of Appeals for the Eighth Circuit, *en banc*, held that by the continuing maintenance and recognition of the two separate craft classifications for train porters and brakemen, Negro train porters had been discriminated against on the basis of their race and that the effects of such discrimination continued to adversely affect Negro train porters, who upon the widespread discontinuance of passenger train service, were permitted to transfer into the brakemen craft only by forfeiting previously acquired seniority. However, the Court held that because of the "business necessity" doctrine and the fact that the job duties and responsibilities of train porters were not functionally identical to those of brakemen, a complete merger of the craft classifications would not be ordered. In order to accommodate the considerations of safety and efficiency in railroad operations, the Court directed the Railroad to establish a procedure, generally consisting of a physical examination and various training programs, by which it could be determined whether individuals previously employed as train porters were in fact qualified to work on the Railroad as brakemen. Individuals who successfully completed these procedures would be afforded the right to transfer into the craft of brakemen and to carry with them one-half of the seniority which they had acquired in their employment as train porters.[3] Since some train porters had already transferred into the craft of brakemen and were serving in that capacity at the time of the Court's opinion, these

---

[3] The figure of 50% carryover seniority was based on, *inter alia*, the dissimilarity of the job duties of train porters and brakemen, and the recognition that some train porters may have preferred the work of train porter over that of brakemen. *Frisco*, 464 F.2d at 311, n. 13.

individuals would not be required to undergo the training program but would instead simply be credited with additional seniority equivalent to one-half of their previous acquired train porter tenure. The Court specifically held that the Railroad would not be obligated to hire or assign any former train porter who could not successfully complete the physical examination and training program and further stated that the Railroad would not be required to assign more than one former train porter to any one particular railroad crew. A monetary award of backpay was denied.

Thereafter, the parties here agreed that this case should be disposed of in accordance with the rationale of the Court of Appeals in *Frisco*. Thus, on December 19, 1973, the United States District Court for the Eastern District of Arkansas, Western Division, entered its order in this case and thereby directed Missouri Pacific Railroad Company to afford its former train porters the rights and remedies specified in the *Frisco* opinion. The District Court also disposed of two issues on which the parties were unable to agree, viz. claims of retired train porters for increased retirement benefits and for the assessment of their attorneys' fees against the defendant. The District Court awarded attorneys' fees but denied plaintiffs' claim for increased retirement benefits. Plaintiffs then appealed the issue of retirement benefits to the Court of Appeals for the Eighth Circuit. In essence, the retired train porters contended[4] that brakemen received higher pay than train porters, that had train porters been permitted to transfer crafts earlier[5] they would have had greater

---

[4] Although the train porters were afforded an opportunity to present factual data regarding this claim (see September 8 and November 6, 1973 letters from the United States District Judge to counsel for train porters, A. 42-43), they did not do so. No evidentiary record has ever been made in this case and there is thus no record support for petitioners' "factual" assertions. (Citations to "A" are to the Appendix in the Court of Appeals.)

[5] Actually, transfers were permitted but with loss of seniority acquired while working in the former craft.

earnings at retirement, that under the Railroad Retirement Act retirement pay is affected by the amount of earnings during employment, and that therefore train porters should receive some monetary award[6] to compensate for this alleged differential in the retirement pay of train porters and brakemen. In *Norman v. Missouri Pacific Railroad Co.*, 497 F.2d 594 (8th Cir. 1974), the Court of Appeals affirmed the decision of the District Court, relying largely on the rationale of *Frisco*.

---

[6] In a November 6, 1973 letter to counsel, the District Judge announced his tentative ruling on the two unresolved issues. As to the retirement pay claim, the District Judge stated: "The Court is persuaded that the issue of retirement benefits is controlled by section IV of the *Frisco* opinion, * * * Furthermore, plaintiffs' difficulties are compounded by the apparent inability of the Court to extract the relief requested from a party before the Court. See Memorandum of United Transportation Union, filed October 23, 1973." See Appendix 2 to Brief for Appellee Missouri Pacific Railroad Co., filed in the Court of Appeals. Both the United Transportation Union and the Railroad contend that under the statutory scheme provided in The Railroad Retirement Act, 45 U.S.C.A. § 228, *et seq.*, the Railroad Retirement Board has exclusive jurisdiction to determine entitlement to an annuity and the amount thereof (See 45 U.S.C.A. § 228j(b) (1, 2 and 3)) and would be an indispensable party to any litigation seeking increased benefits.

ARGUMENT

Petitioners predicate their request for review on an asserted conflict in the decision of the Court of Appeals for the Eighth Circuit in this case with decisions from other courts of appeal. However, respondent respectfully submits that the basis upon which the Court of Appeals disposed of petitioners' claims involves no direct conflict with the decisions cited by petitioners from other circuits; nor does this case involve any important question of federal law warranting review by this Court.

We note initially that petitioners here do not purport to represent a *class* of Negroes similarly situated—the complaint involves claims asserted by ten individual employees of the Railroad. Moreover, as of the time when the Court of Appeals for the Eighth Circuit first considered this case (the jurisdictional issue), three of the named plaintiffs had retired from service, three had been transferred to the craft of brakemen (without "carryover" seniority) and only four continued their employment as members of the craft of train porters. See *Norman v. Missouri Pacific Railroad Co.*, 414 F.2d 73, 75 n.1 (8th Cir. 1969). Later, in their proposed findings of fact submitted to the United States District Court on April 20, 1972, the petitioners stated that seven of the ten plaintiffs had retired and that only three were currently employed by the Railroad, all of the latter three having transferred to other crafts. (A. 37).

In its broadest scope, this case presents issues as to the proper approach for the federal courts to take in prescribing relief in cases brought under Title VII of the Civil Rights Act of 1964. There is certainly no dispute that federal courts possess wide discretion in fashioning decrees to afford relief consistent with the Act. See e.g. *United States v. St. Louis-San Francisco Railway*, 464 F.2d 301 (8th Cir. 1972), cert. denied, 409 U. S. 1107 (1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), cert. denied 404 U.S. 984 (1971); *Par-*

ham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970). Nor is there any real dispute as to the basic rules governing the award of backpay under 42 U.S.C. § 2000e-5(g). Backpay is one possible form of relief in suits brought under the Act, but the Act itself explicitly recognizes that the grant of such relief is discretionary. Section 2000e-5(g) provides that in fashioning relief for unlawful employment practices, the Court "*may* include reinstatement or hiring of employees, *with or without backpay*. . . ."

Thus, the cases (including those relied on in the petition for a writ of certiorari) recognize as they must that the award of backpay in a Title VII case is discretionary. See e.g. *Pettway v. American Cast Iron Pipe Company*, 494 F.2d 211 (5th Cir. 1974); *United States v. Georgia Power Company*, 474 F.2d 906 (5th Cir. 1973); *Jinks v. Mays*, 464 F.2d 1223, 1226 (5th Cir. 1972); *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969). It is true that some of the relevant decisions reflect differences in the description of the parameters of this discretion, particularly with reference to the issue of whether or not good faith conduct on the part of the defendant is an appropriate consideration. Compare *United States v. St. Louis-San Francisco Railway, supra* and *United States v. N.L. Industries*, 479 F.2d 354 (8th Cir. 1973) with *Pettway v. American Cast Iron Pipe Co., supra*.

However, the extent to which a defendant's good faith may be considered in determining the propriety of a backpay award is not the determinative issue here, and is one which this Court would probably not reach should certiorari be granted. As the Court of Appeals noted below, after observing that its prior cases had permitted consideration of a defendant's good faith, nevertheless in this instance, "Even a contrary position regarding the relevance of bad faith would not repudiate our determination in *Frisco* nor effect Frisco's applicability to this case, for an adequate and independent ground sustains the result

reached. . . ." *Norman v. Missouri Pacific Railroad Company*, 497 F.2d at 594, 597.

This alternative ground warranting the denial of backpay[7] is predicated on the Court of Appeals' recognition (both in *Frisco* and in the opinion below) that train porters were not automatically entitled to transfer into the craft of brakemen. As the Court stated below:

> "Additional qualifications were essential to the remedial right (of plaintiffs) to membership in the class of brakemen. In order to demonstrate entitlement to relief, each plaintiff was required to establish that he possessed the qualifications for a brakeman. Absent the possession of those qualifications, a plaintiff had not been the subject of the alleged racial discrimination. Backpay was refused because there was no ascertainable standard for judging whether present unqualified train porters would otherwise have been qualified during the course of their employment to be brakemen but for racial discrimination. No standard could determine the right to backpay itself nor the date from which to compute any right to backpay." 497 F.2d at 597.
>
> * * * * * * *
>
> ". . . The parties here have likewise recognized the functional non-equivalence of the two crafts. *Eligible* train porters were permitted a right to transfer crafts. However, some train porters who are now retired might never have been qualified to be brakemen even without any racial discrimination. They are not thus subjects of past discrimination and are not entitled to relief in the form of enhanced retirement benefits. Other train porters

[7] For the purpose of considering the propriety of petitioners' retirement pay claims, both courts below have treated the claims as indistinguishable from the more usual "back pay" claims, i.e. for lost wages.

> now retired who are unqualified to be brakemen, cannot establish the retrospective dates of the onset of their non-qualification with sufficient certainty to permit the imposition of additional retirement benefits. Because of retrospective qualification for the brakemen craft is impossible to measure in the present, no ascertainable standard exists to govern the past right to have been a brakeman nor to establish a date from which any possible retirement benefits could have been computed." *Ibid.*

There is no real inconsistency in the above rationale and the principles enunciated in cases from other circuits cited by petitioners. For example, in *United States v. Georgia Power Company, supra,* the Court stated the issue as follows, citing *Jinks v. Mays,* 464 F.2d 1223, 1226 (5th Cir. 1972):

> "But, back wages are not to be automatically granted whenever a person is ordered reinstated. The wages sought must be 'properly owing to the plaintiffs.' This requires positive proof that plaintiff was ordinarily entitled to the wages in question and, being without fault, would have received them in the ordinary course of things but for the inequitable conduct of the party from whom the wages are claimed." 474 F.2d at 922.

To the same effect, *Baxter v. Savannah Sugar Refining Company,* 495 F.2d 437 (5th Cir. 1974), cert. denied 43 L.W. 3306 (1974), stated in the context of a class action:

> "Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and is thus entitled to backpay or other appropriate relief." 495 F.2d at 444.

Even *Pettway v. American Cast Iron Pipe Company, supra,* (perhaps the case which most narrowly limits a court's dis-

cretion in this area), observed that an employee seeking a backpay award has the initial burden "to bring himself within the class (discriminated against) and to describe the harmful effect of the discrimination on his individual employment position." 494 F.2d at 259.

These principles manifest a consistent approach throughout the circuits, and one which effectively precludes a backpay award here. Train porters now retired as such simply have not, and can not, establish that they were a member of the class discriminated against. As was observed in the concurring opinion in *Frisco*, ". . . since the crafts are not functionally identical the Court cannot assume that *all* porters are qualified to be brakemen." 464 F.2d at 312. In order for the petitioners here to be granted the relief they seek, not only would the Court have to assume that all of the currently retired porters *desired*[8] brakemen positions *and* could have passed the physical examination and training programs specified by the Court as prerequisite to the right to transfer crafts—the Court would also have to resort to sheer conjecture in order to select a date in the past when the transfer would have been effected. Otherwise no determination could be made as to the beginning of the period for which additional relief would be granted.

Petitioners have not demonstrated any conflict, significant to this case, in the decisions of the various courts of appeal. The pivotal issue here is whether on the peculiar facts of this case (where safety and efficiency considerations for one craft of workers significantly differs from that of another, where members of one craft would because of the doctrine of business necessity be required to establish through physical examination and training programs their entitlement to move into the other craft, and where a significant number of the members of one craft have retired from active employment and would thus be un-

---

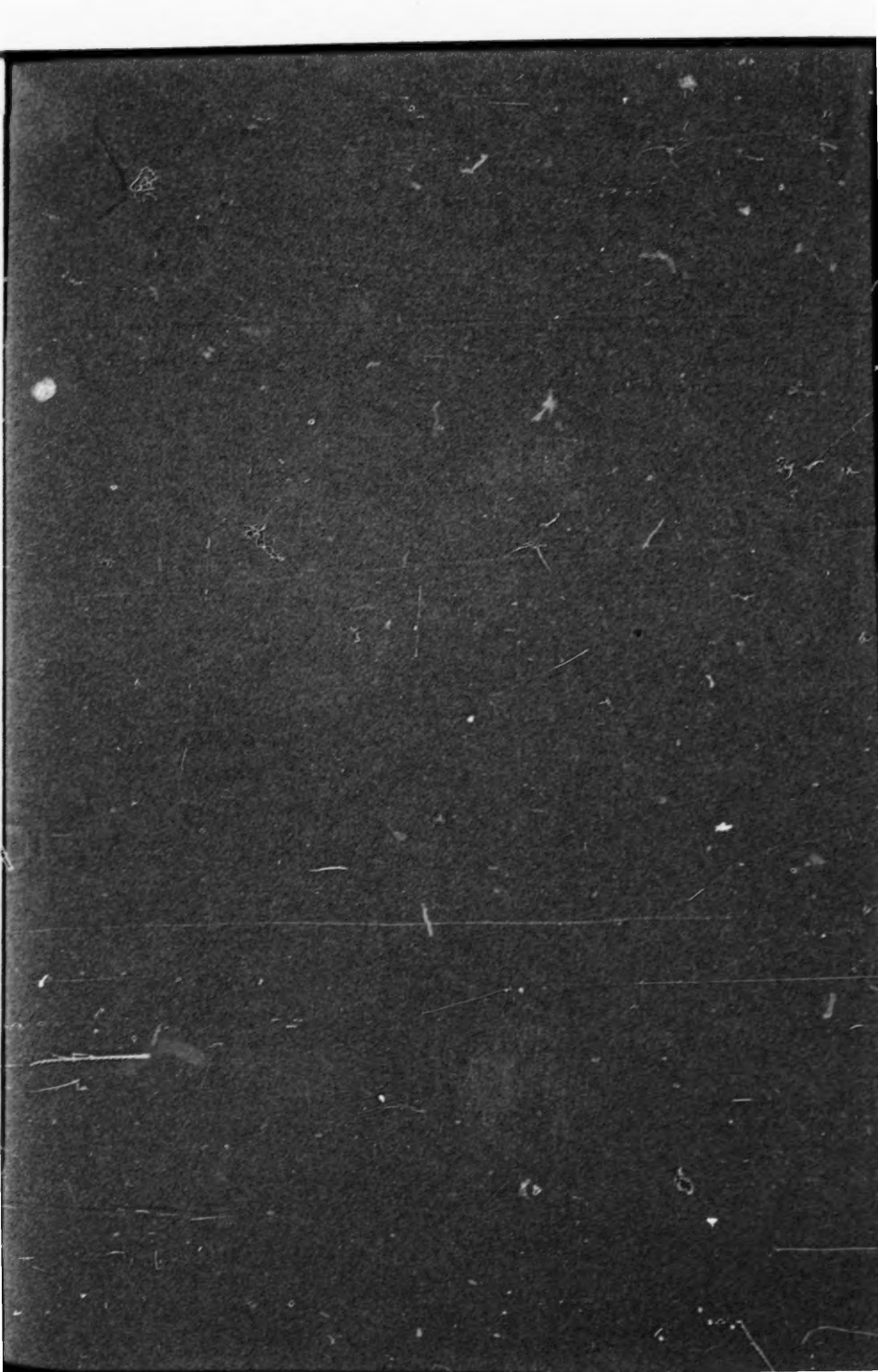
[8] See Note 3, *supra*.

able to satisfactorily complete the prerequisites to craft transfer), the courts below abused their discretion in denying a back-pay award. Respondent submits they clearly did not. Since the peculiar factual circumstances govern resolution of the case, there is no important federal question of general application to suits under Title VII. Finally, the absence of an evidentiary record mitigates against review in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

HERSCHEL H. FRIDAY
G. ROSS SMITH
1100 Boyle Building
Little Rock, Arkansas 72201
Counsel for Respondent Missouri
Pacific Railroad Company



LIBRARY
SUPREME COURT, U. S.

FILED
MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-385
Civil

JOHN W. NORMAN, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT
United Transportation Union in Opposition

CHARLES H. JUDGE
WILLIAM G. HAGER
1601 Continental Trust Building
915 Olive Street
St. Louis, Missouri 63101
Attorneys for Respondents

St. Louis Law Printing Co., Inc., 813 Olive Street 63101 — 314/231-1497

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory Provisions	2
Statement of the Case	4
Reasons for Denying the Writ	5
Conclusion	6

Statutes

45 U.S.C.A. § 228 c (a)(1)	2, 5
45 U.S.C.A. § 228 c (j)(i)	3, 5
45 U.S.C.A. § 228 c (j)(ii)	3, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-395
Civil

JOHN W. NORMAN, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT
United Transportation Union in Opposition

OPINIONS BELOW

The Court of Appeals Opinion is reported at 457 F2d 594. The opinion of the District Court is unreported. Both opinions appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether individual plaintiffs, retired Negro railroad employees whose appeal to the Court of Appeals was limited exclusively to the denial of increased retirement benefits which they are now receiving under the provisions of the Railroad Retirement Act, 45 USCA Sec. 228 et seq., who rejected the District Court's offer to submit factual data to sustain their claim of damages and have ignored the provisions of the Railroad Retirement Act, have raised issues justifying the exercise of jurisdiction by this Court.

STATUTORY PROVISIONS

Since retirement benefits in railroad employment are primarily governed by the Railroad Retirement Act, there is involved herein the provisions thereof applying to the retired petitioners:

45 USCA Sec. 228 c (a)(1)

> "(a) (1) The annuity of an individual shall be computed by multiplying his 'years of service' by the following percentages of his 'monthly compensation': 3.58 per centum of the first $50; 2.69 per centum of the next $100; and 1.79 per centum of the remainder up to a total of (i) $450, or (ii) an amount equal to one-twelfth of the current maximum and taxable 'wages' as defined in section 3121 of Title 26, whichever is greater.
>
> * * * * * * * *
>
> In computing the monthly compensation, no part of my month's compensation in excess of $300 for any month before July 1, 1954, or in excess of $350 for any month after June 30, 1954, and before June 1, 1959, or in excess of

$400 for any month after May 31, 1959, and before November 1, 1963, or in excess of $450 for any month after October 31, 1963, and before October 1, 1965, or in excess of (i) $450, or (ii) an amount equal to one-twelfth of the current maximum annual taxable 'wages' as defined in section 3121 of Title 26, whichever is greater, for any month after September 30, 1965, shall be recognized."

45 USCA Sec. 228 c (j) (i)

"An individual who is entitled to the payment of an annuity under Section 228b of this title (other than subsection (e) or (h) thereof) and had a current connection with the railroad industry at the time such annuity began to accrue, shall be entitled to have a supplemental annuity accrue to him for each month beginning with the month in which he has (i) attained the age of sixty-five and (ii) completed twenty-five or more years of service. The amount of the supplemental annuity shall be $45 plus an additional amount of $5 for each year of service that that individual has in excess of 25 years, but in no case shall the supplemental annuity exceed $70: * * *"

45 USCA Sec. 228 c (j) (ii)

"(2) The supplemental annuity provided by this subsection for an individual shall, with respect to any month, be reduced by the amount of the supplemental pension, attributable to the employer's contribution, that such individual is entitled to receive for that month under any other supplemental pension plan: *Provided, however,* That the maximum of such reduction shall be equal to the amount of the supplemental annuity less any amount by which the supplemental pension is reduced by reason of the supplemental annuity."

STATEMENT OF THE CASE

Following remand of this case to the District Court in Norman v. Missouri Pacific R Co., 414 F2d 23 (8th Cir. 1969), respondent Railroad filed a Third Party Complaint naming this respondent (UTU) as a third party defendant. Trial of the case was postponed pending disposition of the factually similar case of United States v. St.L.-San Francisco Railway Co., et al. (Frisco) which was then pending in the District Court for the Eastern District of Missouri and was further advanced in the adjudicatory processes.

Following the en banc decision of the Court of Appeals in Frisco, 464 F2d 301, cert. den. (409 US 1107) the parties here agreed to offer plaintiffs the identical relief ordered in that case, the petitioners agreeing that back pay was foreclosed by that decision. A judgment was entered pursuant to the agreement and petitioners thereafter appealed solely on the ground that additional retirement benefits were denied those petitioners who had then retired as train porters. The carrier in its Brief in Opposition has properly pointed out that Petitioners were afforded the opportunity to present factual data in the District Court to support their claim for increased retirement benefits but failed to do so.

In affirming the decision of the District Court, the Court of Appeals relied on its prior en banc decision in which back pay was denied. Omitted from petitioner's Statement of the Case is the fact that that result was independently dictated by the fact that the crafts of train porter and brakeman were in fact non-identical, that the experience of a train porter did not, per se, qualify him to be a brakeman, and that employment of train porters as brakemen was conditioned upon the train porters successfully qualifying for such employment through a training program which was subsequently implemented by a

decree of the District Court. This condition was in recognition of the fact that railroad operation is a high risk occupation involving the safety of the general public as well as operating employees.

REASONS FOR DENYING THE WRIT

Aside from the reasons advanced by Respondent railroad, with which this Respondent concurs, we submit two additional reasons, related to the Railroad Retirement Act, which Petitioners have chosen to ignore on the specious argument that the relief they seek is against their former employer rather than under the Railroad Retirement Act.

First: The petition is based on a false premise, stated on page 4 of the Petition "whether the seven plaintiffs who had retired as porters while the litigation was pending were entitled to an upward increase in their retirement pay comparable to what they would be receiving had they retired as brakemen."

This premise assumes falsely that retirement benefits under the Railroad Retirement Act are directly related to the classification of the retired employee. Section 45 USCA (c)(a)(1) dispels this myth by providing the formula for retirement benefits, based solely on monthly compensation with heavy emphasis on the lower spectrum of the pay scale (and modest ceilings), with years of service as a multiplier. Thus, a lower paid employee may very well, and may very probably, receive a retirement annuity at least equal to a retired employee who had worked in a different classification at a higher rate of pay.

Second: The provisions of Section 228 c (j)(i) of the Railroad Retirement Act providing for supplemental annuities to retirees with twenty-five or more years of service (which includes all of the petitioners), and the limitations on this supplemental an-

nuity imposed by section 228 c (j)(ii) have been totally ignored by petitioners. The effect of these statutory provisions would wipe out any benefits which petitioners could conceivably gain by the result they seek, which would simply substitute a private annuity for the statutory supplement and which would thus be self defeating.

In response to the Petitioners Petition we believe it pertinent to point out that they have not recognized the problems raised by the Railroad Retirement Act, they have ignored invitations by the District Court to submit factual support of their claim, and the Petition should be denied.

CONCLUSION

The petition for Writ of Certiorari should be denied.

Respectfully submitted

CHARLES R. JUDGE

WILLIAM C. MAIER
1601 Syndicate Trust Building
915 Olive Street
St. Louis, Missouri 63101
241-4261
Counsel for United
Transportation Union